United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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CASE [illegible] 2576

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

B

-against-

P/S

ANTHONY ASTONE,

Defendant-Appellant.

Appeal from the Sentence of the Hcn. Edmund L. Palmieri, Judge of the United States District Dourt, Southern District of New York

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BRIEF FOR APPELLANT

GREENBLATT & NEUMAN, P.C.
Attorneys for Defendant-Appellant
369 Fullerton Avenue
Newburgh, New York 12550
(914) 562-0500

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Was the presentence report submitted to Judge Palmieri prejudicial to the defendant-appellant and did it comply with Rule 32 of the Federal Rules of Criminal Procedure?

2. Is it improper for the court in imposing sentence to consider whether an individual pled guilty or stands trial and is found not guilty?

STATEMENT OF CASE

This is an appeal from the sentence of the Hon. Edmund L. Palmieri, Judge of the United States District Court, Southern District of New York, imposed on November 27, 1974 upon the defendant-appellant, Anthony Astone.

On April 10, 1974, an eight count indictment was filed in the United States District Court for the Southern District of New York against Anthony Astone under Section 7201 of Title 26 of the United States Code for the crime of wilful attempt

to evade income taxes. (See pp A-2 - A-4 of appendix) Astone was arraigned on April 22, 1974 at which time a plea of not guilty was entered to all counts of the indictment. On October 1, 1974 Astone withdrew his plea of not guilty and entered a plea of guilty to Count 4 of the indictment before the Hon. Edmund L. Palmieri, Judge of the United States District Court, Southern District of New York, who ordered a presentence report. Thereafter, on November 27, 1974 Astone was sentenced to four months in prison and a committed fine of $2,500.00. The other seven counts of the indictment were dismissed.

Count 4 of the Indictment alleged that Astone as President and responsible Corporate office of Newburgh Moving and Storage, Inc., unlawfully, wilfully and knowingly did attempt to evade and defeat a large part of the income taxes due and oweing to the United States of America by said corporation for its fiscal year ending September 30, 1970 by alleging in the corporate income tax return taxable income of $20,637.42 with a tax due thereon of $4,540.23 whereas the taxable income was $53,882.54 upon which the corporation owed a total tax of $20,331.80. Astone initially refused to plead to any count of the indictment. It was only after he was offered a plea to one count of the indictment upon the understanding that the error, if any, was one of a couple of thousand dollars, that he agreed to a change in plea. He further believed that the question of the extent of his tax liability would be one for determination

between he and the Treasury Department. At the time of entering his plea of guilty, Judge Palmieri questioned Astone and erroneously used the figure of $53,882.00 instead of $20,331.80 in the following colloquy:

> Q. This says that the tax, according to the income that you reported, was $4,540.00 and that according to the corrected tax liability it was $53,882.00. You dispute that $53,000.00 figure, I take it?
>
> A. Yes.
>
> Q. But do you admit that the figure you did in fact owe was substantially greater, that is, at least several thousand dollars greater than the $4,000 and some that you did report?
>
> A. I do, sir.
>
> Q. Have you any suggestion as to what the correct amount in fact was?
>
> A. I really don't know at this time, sir.
>
> Q. But you admit that it was substantially greater and at least several thousand dollars greater?
>
> A. Yes, sir.

See p. A-9 of the Appendix.

Astone attempted to determine the precise amount involved prior to sentencing but the Internal Revenue Service refused to discuss the amount owed with him or his representative. The Assistant United States Attorney also requested the Internal Revenue Service to discuss with Astone the question of the taxes owed prior to sentencing but to no avail. At the time

of sentencing, Astone's attorney indicated that Astone disputed the amount alleged to be due the Government. (See pp. A-14 and A-15 of the Appendix). The presentence report submitted to Judge Palmieri indicated that IRS Special Agent, Richard V. Collery stated that Newburgh Moving and Storage, Inc. currently owed the government $147,000 in taxes dating back to 1966 and Astone himself owed the same amount for personal taxes, also dating back to 1966. At the time of sentencing, Judge Palmieri stated that the corrected tax liability was about five times that which was declared, namely $20,331.80 as opposed to approximately $4500. (See p. A-20 of the Appendix).

The presentence report also referred to various arrests of Astone. Little in the presentence report dealt with the life Astone has led over the past twenty years.

POINT I

THE PRESENTENCE REPORT SUBMITTED TO JUDGE PALMIERI WAS PREJUDICIAL TO THE DEFENDANT-APPELLANT AND DID NOT COMPLY WITH RULE 32 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules 32 of the Federal Rules of Criminal Procedure deals with the presentence investigation report that may be ordered by the Judge. Subsection (c) (2) of said rule states as follows:

> The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant and such other information as may be required by the Court.

The presentence report prepared by Allen Mendel, U. S. Probation Officer and submitted to Judge Palmieri did not comply with the above and was highly prejudicial against Astone. There are a number of things in the report that did not belong. While great effort was made to investigate the adverse aspects of Astone's life, little or no effort was made to point out those characteristics and circumstances that may have lead the Judge to impose a sentence of probation. Furthermore, no opportunity was given for Astone to controvert some of the inaccurate and highly prejudicial statements in the report.

Section (c) (2) of Rule 32 indicates that the report should contain any prior <u>criminal record</u> of the defendant. The record submitted not only discussed the three convictions in the late nineteen forties for which Astone served time but also indicated six other occasions on which the defendant has been <u>arrested</u>. It is respectfully submitted that arrests do not constitute a "prior criminal record of the defendant". The fact that these charges were subsequently dismissed or

withdrawn did not alter the highly prejudicial effect they had on Judge Palmieri in his attempt to ascertain a picture of Astone's character. This effect is apparent in the instant case. With the exception of events occurring more than a quarter of a century ago and for which he paid his debt to society, Astone has led an exemplary life. It can only be assumed that Judge Palmieri considered Astone's prior arrests when at the sentencing he commented as follows:

> I note that although these convictions are for the most part, rather old convictions, and since he seems to have taken a better direction in his life since he got into the moving business, the fact nevertheless remains that he has been on the borderline of good community conduct.
>
> See p. A-21 of Appendix.

This reference to Astone being "on the borderline of good community conduct" can no way be justified in light of the record that Astone has had since his problems over 25 years ago. It must be assumed that the arrests listed in the presentence report had a bearing on Judge Palmieri's statement. The same rationale that only allows a witness, on cross examination, to be questioned about <u>prior convictions</u> when attempting to impeach credibility applies to the question of what constitutes a criminal record for purposes of a presentence investigation report. The instant case provides a perfect illustration of why mention of defendant's prior <u>arrests</u> should be forbidden. The presentence report indicated that on January 3, 1971 Astone was

arrested in Fort Lauderdale, Florida on a charge of Assault and Battery and he was found not guilty on February 19, 1971. This arrest stemmed from an incident in which Astone, acting as a good Samaritan, attempted to break up a fight. At the trial, the individual who was fighting with the complainant against Astone testified that it was he who had thrown the punches and that Astone had intervened in an attempt to stop the fight. The charge was immediately dismissed; however, this incident found its way into the presentence report. This was the only indication of any problem Astone had with the law since 1952 other than the Massachusetts situation which was clarified at the sentencing. (See pp A-21, A-37 and A-38 of the Appendix); however Judge Palmieri indicated that Astone had "been on the borderline of good community conduct." (See p. A-21 of the Appendix).

The probation officer who prepared the presentence investigation report attempted to thoroughly investigate those areas of Astone's early life which did not reflect kindly upon him, however, little was done to investigate the type of life Astone has led for almost a quarter of a century. What may appear to be a minor point but illustrates the lack of impartiality by the preparer of the report is an indication in the report that Astone "states to us that he attends church regularly." (Underlining added). Certainly Astone's church attendance could have been verified with Astone's clergyman whereby a positive state-

ment could have been included rather than expressed in such form as to leave the reader in doubt. Moreover, had the preparer of the report investigated Astone's role in his community and presented same in the report, there is no way that Judge Palmieri could have indicated that Astone had "been on the borderline of good community conduct." Rule 32 (c) (2) of the Federal Rules of Criminal Procedure requires that such information about a defendant's characteristics which would be helpful in imposing sentence or in granting probation should be brought to the court's attention. It is respectfully submitted that the presentence investigation report in this case did not begin to reflect on the exemplary life Astone has led for the past twenty some years.

The report did not adequately reflect the labor expended by Astone to establish and build up his moving business. While in the motel business, he worked nights loading and unloading trucks for a moving company. (See letter of R. E. Garrett, p. A-25 of the Appendix). He finally went into the moving and storage business for himself. As reflected in the letter submitted by his stepson, Cary Essert (See p. A-26 of the Appendix), Astone would work all week and then at least three weekends per month would go on the road working 16-20 hours per day, sleeping "in the truck for a few hours rest." Astone did not set behind a desk but loaded and unloaded the trucks and drove them making deliveries himself. A further indication of the type of man

with whom the Court is dealing is the fact that Astone has always treated his stepson as his own, taking him into the business and giving him a part of it.

Perhaps the most significant reflection on Astone's character can be gleaned from the admiration and respect he has earned in his community which was not reflected in the report. The letters, many unsolicited, submitted to the Court on Astone's behalf, came not only from friends and relatives, but also from business competitors and community leaders. They crossed racial and ethnic lines and are a testimonial to his character.

A letter submitted by William Pickett, Past President of the Newburgh Chaper of the NAACP, attested to the help extended by Astone to persons "regardless of race, color or creed". (See p. A-28 of the Appendix). Michael J. Walsh, Executive Director of the New York State Correction Officers Association, Inc. pointed out not only Astone's financial assistance but more importantly the hiring by Astone of local high school dropouts who in conjunction with that organization's Juvenile Delinquency Program needed jobs to continue their education. (See p. A-29 of the Appendix). John Schuler, Commander of American Legion Post No. 1167, wrote of the time and efforts as well as financial assistance given by Astone to said Post's Boy Scout Program (See p. A-30 of the Appendix). Arthur N. Paras, Past President of the Board of Education in Chester, New York,

indicated that Astone would not only donate use of his equipment for various summer programs for the School District but also drive the truck himself. Paras also served as Co-Chairman with Astone for the Masonic Brotherhood Fund for the Hospital for the Elderly at Utica, N. Y. Particularly significant in Paras' letter is the statement "Many of us who have known him assure you that he has never been in any trouble before." (See p. A-31 of Appendix). This is an indication of Astone's life in his community where nobody had any reason to suspect that Astone had problems over twenty years ago. Astone's concerted effort to make a new life for himself can be vouched for by the members of his community. Letters from Nick Lentini, Robert J. DeSantis and Joseph S. Gentile, President, Past President and Member respectively of the Newburgh Chapter of UNICO National, attested to Astone's hard work for this organization including mental health and scholarships for students (See pp. A-32 - A-34 of Appendix). John E. Oncher, Retired Deputy Chief of Police for Newburgh, cited Astone's achievements in introducing new enforcement programs to the police department (See p. A-35 of Appendix). George A. Alfano, Executive Vice President of The First National Bank of Highland wrote of Astone's excellent credit as well as the many people in the area he has helped (See p. A-36 of Appendix).

The foregoing illustrates Astone's involvement in his community. He has been very charitable in aiding those in need

and more importantly, this aid has not been merely financial but is reflected by his willingness to donate his time and labor. This involvement in the community is not reflected in the presentence investigation report. With the exception of events occurring over 25 years ago and for which Astone has paid his debts to society, he has led an exemplary liefe as indicated by the letters from the numberous leaders and acquaintances in his community. At the sentencing, without justification, the Court indicated that "he has been on the borderline of good community conduct." Nothing in Astone's life in the past twenty some years would justify the emphasis placed by the presentence report and the Court on his criminal record in view of the fact that said record was compiled by acts committed over a quarter of a century ago. It is respectfully submitted that nothing will be gained by requiring this individual to serve time in prison.

Judge Palmieri, at sentencing, indicated the following:

> ... the excuse of sloppy bookkeeping and being too busy with other things are excuses that cannot be accepted in extenuation because Astone has shown by his previous business activities and, indeed, some rather marked success in the business community, that he is well aware of the performance of maintaining proper books and proper records....
>
> See p. A-20 of Appendix

In fact, his uncle who served as his accountant, was the one who was sloppy and there is nothing in Astone's background

that would indicate that he knew how to maintain proper books and records. One aspect of the presentence report is particularly significant in this regard. It indicated that while serving time in Elmira, Astone underwent psychological testing and while the findings were unremarkable, the report of the reformatory indicated he showed lack of judgment and had an IQ of 92. This, coupled with his quitting school at age 16, would explain Astone's difficulty in maintaining two businesses, and further supports the contention that no purpose will be served by sending Astone to prison. It would seem commendable that an individual with limited education and abilities has made a relative success out of himself through hard work and perseverance.

The presentence report gives a synopsis of the Government's case against Astone. More specifically it states:

> According to agent Collery, Newburgh Moving and Storage, Inc. currently owes the government $147,000 in taxes dating back to 1966 and defendant himself owes the same for personal taxes, also dating back to 1966.

While the report is quite explicit about the Government's case against Astone, it indicates that Astone stated that his corporate and personal income were underreported due to the fact that he was exceptionally busy and while Astone admitted some tax evasion, he claimed that most money owed can be accounted for in terms of business expenses. Despite Astone's

contention, no opportunity was given to Astone to explain the gross discrepancies in the Government's figures. The Probation Officer refused to allow Astone to attempt to explain these discrepancies as he said he was no accountant. On the other hand the same Probation Officer considered himself expertise enough to listen to the Government's version of the case and include it in his report. This report included an indication that Astone owed $294,000 in back taxes at a time that Astone claimed he owed a couple of thousand dollars. In a conversation between Astone and Probation Officer Mendel in the hallway of the Federal Court Building on December 2, 1974, Mendel told Astone that he had to believe someone and therefore he relied on the statements of IRS Special Agent Collery. This reliance is further reflected in the recommendation of a one year sentence. Certainly no mention of amounts should have been included unless both parties had an opportunity to present their case.

As indicated by Astone's attorney at the time of sentencing, attempts were made to determine the amount involved prior to sentencing, but the Internal Revenue Service steadfastly refused to discuss this matter. (See p. A-14 of Appendix). Astone initially refused to plead to any count of the indictment. It was only after offered a plea to one count of the indictment upon his understanding that the error, if any, was one of a couple of thousand dollars, that he agreed to a change

of plea. Judge Palmieri was aware that Astone disputed the Government's figures at the time of the plea (See pp. A-8 and A-9 of Appendix). Astone pled believing proper emphasis would be given to the life he had led since his prior convictions and that the question of his tax liability would be one for determination between he and the Treasury Department. Instead both the Probation Officer and Judge Palmieri placed undue emphasis upon his prior convictions. Furthermore the presentence report incorrectly reflected and grossly exaggerated his unreported income at $294,000 without affording Astone the opportunity to rebut this amount. Judge Palmieri, despite his colloquy with Astone at the time of the plea with regard to the amount in dispute, stated at the sentencing that the count to which the defendant pled guilty reflected a corrected tax liability about five times that which was declared (See p. A-20 of Appendix).

It is apparent that the Internal Revenue Service's prime consideration in this matter was a conviction rather than to correct any mistakes with a view toward restitution. The refusal to discuss the amount owed or give Astone the opportunity to explain the gross discrepancies and to rectify any mistakes by making restitution does not speak well of the manner in which the Internal Revenue Service has handled this matter. This position by the Internal Revenue Service, coupled with the failure of the probation officer to comply with Rule

32 (c) (2) in preparing the presentence report, was highly prejudicial to Astone and did not afford him the opportunity to come before the Court at sentencing in a light that would have made it extremely unlikely that he would have been sentenced to prison.

POINT II

THE COURT'S INDICATION THAT IN IMPOSING SENTENCE IT CONSIDERS WHETHER AN INDIVIDUAL PLEADS GUILTY OR STANDS TRIAL AND IS FOUND GUILTY WAS IMPROPER

An individual facing criminal charges should not be placed in the position of believing he is innocent but pleading guilty knowing a longer sentence will be imposed if he chooses to stand trial. In the instant case Astone initially refused to plead to any count of the indictment. It was only after he was offered a plea to one count of the indictment upon the understanding that the error, if any, was one of a couple of thousand dollars, that he agreed to a change in plea. Astone always maintained that if there was a mistake, it was relatively small. Furthermore, he acted under the assumption that if he pled, he would be treated more leniently. This assumption proved correct as Judge Palmieri stated at the sentencing:

> He pleaded guilty and that is a fact that I have taken into consideration .... I have in mind that if he had stood trial, I would have imposed a sentence of a certain duration. Having pleaded guilty, I think he is entitled to a lesser sentence.

See pp. A-20 and A-21 of Appendix.

This position taken by Judge Palmieri is improper and puts a defendant in the position of a gambler. Even if he feels he is innocent and wants to go to trial, he will give second thoughts as to whether it is worth the risk of presenting his case to a jury. This dilemma emphasizes the worst aspect of plea bargaining as the question does not come down to a matter of the defendant's guilt or innocence but to one of punishment. This results in some who feel they are innocent pleading guilty to avoid a more severe sentence.

The Court's attention is respectfully directed to U.S. v. Stockwell, 472 F. 2d 1186 (C.A., 9th Circ., 1973), certiorari denied 93 S. Ct. 1924, 411 U.S. 948, 36 L. Ed. 2d 409, in which the district judge told the defendant before trial that if he pleaded guilty to one count he would receive a three year sentence but that if he chose to stand trial and was convicted, he would receive a five to seven year sentence. The defendant elected to stand trial, was convicted, and was given concurrent seven year sentences. The United States Court of Appeals for the 9th Circuit held that where the record left the unrebutted inference that the defendant was punished with a longer sentence for electing to stand trial, the sentence could not be sustained.

While the facts in the case at bar are quite different than the above, the Stockwell case is cited as it stands for the proposition that it is improper to base a sentence on whether

a defendant pleads or chooses to stand trial. It illustrates the dilemma in which a defendant is placed by this practice.

CONCLUSION

The sentence below was excessive in light of all the circumstances and no purpose will be served by sending the defendant-appellant to prison.

Respectfully submitted,

GREENBLATT & NEUMAN, P.C.
Attorneys for Defendant-Appellant
369 Fullerton Avenue
Newburgh, New York 12550
914 - 562-0500